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No. 87-1015

In the Supreme Court of the United States

CHARLES F. MONAHAN, ET AL.,
Petitioners,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR AMICUS CURIAE STATE OF MISSOURI

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INTEREST OF AMICUS CURIAE

The state of Missouri submits this brief *amicus curiae* in support of the petition for a writ of certiorari to the United States Court of Appeals for the First Circuit.

The state of Missouri, like the commonwealth of Massachusetts and the states appearing otherwise as *amici*, regulates a variety of professional occupations through administrative agencies. These agencies, much like the Massachusetts Pharmacy Board, are members of the executive branch of the state government acting in accordance with the legislative mandate to regulate the profession for the purpose of protecting the health, safety, and welfare of the citizens of the state of Missouri. The state of Missouri has a legitimate and valid interest in the present actions of the Federal Trade Commission regarding such regulatory agencies and shares with its fellow *amici* states the belief that the issue presented to this Court in the above-styled cause is one in need of resolution by this Court.

REASONS FOR GRANTING THE WRIT

The state of Missouri agrees with the position taken by petitioner in its brief and would further clarify the fundamental issues that underlie the need for this Court to grant certiorari in this matter.

The states are dealing with an intrusion into the fundamental concept of federalism. The Federal Trade Commission is asserting jurisdiction over the acts of state regulatory agencies for which it has no jurisdiction.

The applicability of the provisions of the Sherman Act to state governments, and hence the jurisdiction of the Federal Trade Commission as it relates to anticompetitive conduct of the states, was clearly enunciated in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed.

315 (1943). This Court, relying on principles of federalism and state sovereignty, refused to construe the Sherman Act as applying to anticompetitive conduct of states acting through their legislatures. Rather, this Court ruled that the Sherman Act was intended only to prohibit private restraints on trade and refused therefore to infer an intent to nullify a state's control over its officers and agents in activities directed by the legislature. As a general principle, therefore, no such jurisdiction has been or may be granted the Federal Trade Commission in such a case absent a specific showing of Congressional intent to do so. This "state action immunity" has, therefore, been accorded the acts of state legislatures and state Supreme Courts acting in a legislative capacity. *Hoover v. Ronwin,* 466 U.S. 558, 567-568, 104 S.Ct. 1989, 80 L.Ed. 2d 590 (1984).

This general principle has been refined, however, in order to deal with the anticompetitive acts of entities that were not clearly part of state government but yet were nonetheless asserting the same state action immunity. Tests were, therefore, devised by this Court for determining whether private entities could avail themselves of the state action immunity claim (i.e.: (1) that the entity acted pursuant to a clearly articulated and affirmatively expressed state policy and (2) that such activity was actively supervised by this state. See *City of Lafayette, Louisiana v. Louisiana Power & Light Company,* 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978)); and whether governmental entities that did not rise to the level of the state itself, such as municipalities, were likewise immune (i.e.: (1) that the actions were taken pursuant to a clearly articulated state policy to displace

competition with regulation. See *Town of Hallie v. City of Eau Claire,* 471 U.S. 34, 44, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985)).

The instant matter, however, entails activities engaged in by a state regulatory agency created pursuant to expressed statutory authority and acting in accordance with the intended legislative mandate. A state legislature evidences its intent to regulate a particular profession by, among other things, creating a regulatory agency and empowering that agency to make rules and regulations consistent with this legislative intent. All such licensing-related legislation is by its very nature inherently anticompetitive in that it at the very least places restraints on entry into the profession by limiting licensure to those individuals who meet the necessary requirements. Such action by the state legislature, although arguably anticompetitive in nature, would nonetheless fall within the state action immunity doctrine and would, therefore, not be subject to Federal Trade Commission review.

Such legislatures are not, however, by any stretch of the imagination, capable of anticipating the plethora of issues that arise in the day-to-day administration of such legislation. Legislatures, therefore, long ago recognized the need for the creation of agencies uniquely qualified by either experience or education to handle the duties associated with regulating the licensed profession, including the promulgation of regulations as necessary. These state regulatory agencies were created by legislatures for the express purpose of facilitating and implementing the regulatory goals of the legislation. It is here, however, that the Federal Trade Commission alleges

that the state sovereignty ends. A legislature may express an intent and purpose to engage in apparently anticompetitive activity without Federal Trade Commission interference. A state legislature that expresses such an intent and purpose and delegates the administration of such intent and purpose to a legislatively-created body existing within the executive branch of the state government has, however, according to the Federal Trade Commission, forfeited its sovereignty in this issue to the Federal Government.

That the concept of federalism stands or falls based on a legislature's inability to draft sufficiently narrow statutes so as to foresee every conceivable exigency that may arise in the regulation of a licensed profession and thereby forego the necessity of establishing state agencies to superintend the implementation of those statutes is ludicrous. Were this the case, the entire concept of delegation of legislative authority to administrative agencies would serve merely to toll the death knell of state sovereignty, for once the legislature delegates the regulation-making authority to the state agency, it would be deemed to have transferred jurisdiction of the agency's actions to the federal government. Certainly the concept of state sovereignty was never intended to be subject to so cavalier a treatment or to be dismissed so lightly as this.

Yet this is the position taken by the Federal Trade Commission. The FTC is more than willing to accord sovereignty to the acts of the state legislature alone, knowing full well that it is logistically impossible for any legislature to supervise a regulated profession itself on a daily basis. However, once this authority is dele-

gated to a state agency, the Federal Trade Commission then claims jurisdiction and authority to review and supervise the actions of that agency. Rather than coming within the state action immunity doctrine as rightly owed a sovereign state, the agency must now meet one or both of the above-cited tests to determine if its activities constitute state action. Such should not be the case.

This is the appropriate time to review this matter. Although the Federal Trade Commission has cited *Federal Trade Commission v. Texaco, Inc.*, 555 F.2d 862, 879 (D.C. Cir.) (en banc), *cert. denied* 431 U.S. 974 (1977) for the proposition that substantive defenses properly raised in an administrative proceeding are generally premature when raised in defense to compliance with a subpoena (see: Appendix to the Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit at A30-31), such a finding is not necessary here.

In the above-cited *Federal Trade Commission v. Texaco, Inc.*, case, the court set forth this previously-cited general rule and then stated the following:

> Moreover, in holding that an administrative subpoena must be enforced if the information is relevant to a lawful purpose of the agency, and not unduly indefinite or unreasonably burdensome, the Supreme Court has clearly rejected other defenses. The reasons for this rule are obvious. If parties under investigation could contest substantive issues in an enforcement proceeding, when the agency lacks the information to establish its case, administrative investigations would be foreclosed or at least substantially delayed.

(At 879.)

This is not the case here. The fundamental issue here is one of jurisdiction. Facts relating to that issue are not the subject of the subpoenas. The Federal Trade Commission does not lack "information to establish its case" on that issue, nor does the nonacquiescence of the state to these subpoenas "foreclose or at least substantially delay" the resolution of that issue.

As set forth in the above quote, subpoenas are to be enforced if they are "relevant to a lawful purpose." In that the Federal Trade Commission is acting beyond the scope of its authority, no lawful purpose is to be attained by requiring the enforcement of these subpoenas. The additional cost and burden of responding to such subpoenas placed on the petitioner, and on other states likewise dealing with the Federal Trade Commission, is in no one's best interest and may be avoided by a review of the petitioner's claim.

CONCLUSION

The matters concerning which the petitioner is requesting this Court to grant certiorari represent a fundamental challenge to the basic concept of federalism and state sovereignty by the Federal Trade Commission. For a federal agency to establish itself as the dispositive overseer of state regulatory actions is clearly beyond the intended purpose of its authority. The Federal Trade Commission has evidenced a determination to expand its scope of authority beyond permissible bounds and will continue according itself this expansive interpretation of its regulatory authority to the detriment of the states in particular and state sovereignty in general until this matter is finally resolved. The state of Missouri, therefore, requests that

this Court grant the petitioner's writ of certiorari in the above-styled case to effectuate the resolution of this question.

Respectfully submitted,

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